(3)

No. 88-1597

Supreme Court, U.S.
FILED
APR 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

The Board of Education of the Westside Community Schools (Dist. 66) et al.,

Petitioners,

v.

Bridget C. Mergens, et al.,

Respondents.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF THE NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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32 pp

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ON PETITION FOR WRIT OF CERTIORARI
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MOTION OF NATIONAL SCHOOL BOARDS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF THE AMICUS CURIAE

The National School Boards Association (NSBA) moves this Court for leave to participate as amicus curiae

herein for the purpose of filing the attached brief.

NSBA is a nonprofit federation of this nation's state school boards associations, the District of Columbia school board and the school board of the Virgin Islands. Established in 1940, NSBA is the only major educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

The individuals who compose this nation's school boards are elected or appointed community representatives, most of whom are not professional educators. They are responsible under state law for the fiscal management, staffing, continuity, and the educational and curriculum standards of the public

schools.

Most of the public school districts in the country receive federal financial assistance and, therefore, are subject to the requirements of the Equal Access Act, 20 U.S.C. §§ 4071-4074 (Supp. 1989).

Respectfully submitted,

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TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE.....	1
REASONS FOR GRANTING THE WRIT.....	3
ARGUMENT.....	3
CONCLUSION.....	21

TABLE OF AUTHORITIES

CASES:	Page
Abington School District v. Schemp, 374 U.S. 203 (1983).....	4
Aguilar v. Felton, 473 U.S. 402 (1985).....	5
Bell v. Little Axe Independent School District No. 76 of Cleveland County, 766 F.2d 1391 (10th Cir. 1985).....10,	17
Bender v. Williamsport, 741 F.2d 538 (3rd Cir. 1984), 475 U.S. 523 (1986).....	passim
Bethel School Dist. v. Fraser, 106 S.Ct. 3169 (1986).....	19, 22
Brandon v. Board of Education, 635 F.2d 971 (2d Cir. 1980), cert. denied, 454 U.S. 1123 (1981).....	12
Clark v. Dallas Independent School District, 671 F.Supp. 1119 (N.D. Tex. 1987), amended, 701 F.Supp. 594 (N.D. Tex. 1988), app. pending, No. 88-1681 (5th Cir. 1989).....	15
Engel v. Vitale, 370 U.S. 421 (1962).....	4

Garnet v. Renton School District No. 403, 865 F.2d 1121 (9th Cir. 1989)..... 18

Hazelwood School Dist. v. Kuhlmeier, 108 S.Ct. 562 (1988) 20, 21, 22

Lemon v. Kurtzman, 403 U.S. 602 (1971)..... 6, 7, 12

Lubbock Civil Liberties Union v. Lubbock Independent School Dist., 669 F.2d 1038, reh'g denied, 680 F.2d 424 (5th Cir. 1982), cert. denied, 459 U.S. 1155 (1983)..... 7, 12

McCollum v. Board of Education, 333 U.S. 203 (1948)..... 4

Nartowicz v. Clayton County School District, 736 F.2d 646 (11th Cir. 1984)..... 8

School Dist. of City of Grand Rapids v. Ball, 473 U.S. 373 (1985)..... 5

Stone v. Graham, 449 U.S. 39 (1980)..... 4

Tinker v. Des Moines Community School District, 393 U.S. 503 (1969)..... 5

Virgil v. School Board of Columbia County, 862 F.2d 1517 (11th Cir. 1989)..... 20

Wallace v. Jaffree, 472 U.S. 38 (1985)..... 4

Widmar v. Vincent, 454 U.S. 263 (1981)..... passim

STATUTES:

Equal Access Act, 20 U.S.C. §§ 4071-4074 (Supp. 1989)..... 2, 16, 23

OTHER AUTHORITIES:

United States Const. amend. I..... 3

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AMICUS CURIAE BRIEF OF
THE NATIONAL SCHOOL BOARDS ASSOCIATION
IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
EIGHTH CIRCUIT

INTEREST OF THE AMICUS CURIAE

The National School Boards Association (NSBA) is a nonprofit federation of this nation's state school boards associations, the District of

Columbia school board and the school board of the Virgin Islands. Established in 1940, NSBA is the only major educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

Nearly all public school districts receive federal financial assistance and, therefore, are subject to the requirements of the Equal Access Act, 20 U.S.C. §§ 4071-4074 (Supp. 1989).

School boards and school district administrators across the country need guidance from this Court as to whether they may, or must, allow student religious groups to meet during the school day. As the law now stands, a school's only safe alternative is to

refuse to allow any club or organization to meet during the school day in order to assure that the school does not violate the constitutional or statutory rights of any child.

REASONS FOR GRANTING THE WRIT

1. A conflict exists in the circuits on the question of whether Widmar v. Vincent applies to elementary and secondary schools.

2. It is unclear as to whether the Equal Access Act, which applies to all school districts that receive federal financial assistance, conflicts with the establishment of religion clause of the first amendment to the U.S. Constitution.

ARGUMENT

Until this Court's decision in Widmar v. Vincent, 454 U.S. 263 (1981), the law was clear that public schools that allow prayer in the schools violate

the Constitution's proscription against establishment of religion. See, e.g., McCollum v. Board of Education, 333 U.S. 203 (1948) (religion classes as part of school curriculum); Engel v. Vitale, 370 U.S. 421 (1962) (reciting in classrooms prayer written by state); Abington School District v. Schemp, 374 U.S. 203 (1963) (scripture reading and reciting Lord's Prayer in classrooms); Stone v. Graham, 449 U.S. 39 (1980) (posting of Ten Commandments in classrooms). Since Widmar the Court has continued to rule that the Constitution forbids prayer in the public schools. See, e.g., Wallace v. Jaffree, 472 U.S. 38 (1985) (moment of silence).

Ironically, although the Court has yet to rule whether religious groups can meet on public school grounds, in 1985 this Court held that public school

teachers cannot provide educational services to students on religious school premises. Aguilar v. Felton, 473 U.S. 402 (1985); School Dist. of City of Grand Rapids v. Ball, 473 U.S. 373 (1985). In Grand Rapids the Court implied that teachers too, are impressionable "and may well subtly (or overtly) conform their instruction to the [religious] environment in which they teach..." 473 U.S. at 388.

Prior to 1981 school boards could feel safe in denying the use of school facilities for religious meetings during the school day, even if other student groups were allowed to meet. However, this Court's decisions in two cases changed this certainty. In 1969 in the case of Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), this Court ruled that students

have free speech rights in the classroom; and then in 1981 in Widmar v. Vincent, this Court held that religious speech is equally protected by the first amendment. School officials then became uncertain as to their obligations with regard to the use of school facilities by religious groups.

This uncertainty increased when in 1984 Congress relied on Widmar in passing the Equal Access Act, 20 U.S.C. §§ 4071-4074. Religious groups have since cited both Widmar and the Act when urging the opening of schools to their meetings.

Courts that have distinguished the Widmar decision from cases involving secondary schools have done so using one or more of three rationales: 1) the presence of a religious purpose (the first prong of the three-prong test in Lemon v. Kurtzman, 403 U.S. 602 (1971));

2) the impressionability of pre-college age students (the primary effect test in Lemon); 3) the presence of a closed forum in public secondary schools, thus precluding a free speech right. While these decisions may provide some schools with grounds for excluding student religious group meetings, their results are at odds with the mandates of the Equal Access Act. Furthermore, not all courts have agreed that these distinctions justify denying student religious groups access to school premises.

1. The presence of a religious purpose.

In Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F.2d 1038. reh'g denied, 680 F.2d 424 (5th Cir. 1982), cert. denied, 459 U.S. 1155 (1983), the Fifth Circuit held that

the school district established religion because the board policy allowing students to gather before and after school for a variety of purposes, including religious ones, was designed to bring religion into the schools. The court noted that the Lubbock School District had engaged in religious practices such as scripture reading over the public address system, teacher led classroom prayer and Bible distribution since 1971. Thus, the court found that the policy failed the first part of the three prong analysis established in Lemon v. Kurtzman.

In Nartowicz v. Clayton County School District, 736 F.2d 646 (11th Cir. 1984), the Eleventh Circuit pointed to the school district's overall practice of supporting religious activities such as religious assemblies, religious signs and

announcements of church-sponsored events as an important consideration in upholding the trial court's grant of a preliminary injunction prohibiting the district from permitting a student religious group to meet on school property after school hours under faculty supervision. The court cautioned, however, that in evaluating the application for a permanent injunction, the district court should assess whether the district has an "equal access" policy, the extent of faculty sponsorship and other factors relating to the creation of a perception in the minds of the students that the school district is either "supporting" or merely "accommodating" religion.

Both of these cases were decided before the Equal Access Act, but there is no reason to believe that the decisions

would have been different if decided today.

In Bell v. Little Axe Independent School District No. 76 of Cleveland County, 766 F.2d 1391 (10th Cir. 1985), the Tenth Circuit reached a similar result, holding that although the district had created a limited open forum, its behavior belied its avowed secular purpose. In that case, the court held that the Equal Access Act did not apply because the school involved was not a "secondary school" within the meaning of the Act. However, the court's discussion of "limited open forum" indicates that it would have ruled in the same manner had the Act been found to apply.

In the case at bar, however, it appears that the lower court believes that the intent of the school district is

irrelevant. When determining whether a religious group should be allowed to meet on school premises, nothing in either the Equal Access Act or the decision below considers the school district's history with regard to attempts to bring religious practices or teachings into the schools. Under both the Act and the decision below, if the school operates a limited public forum, it must allow religious groups to participate on an equal basis.

It is important that the Supreme Court decide whether the Equal Access Act is constitutional with regard to religious groups and, if so, whether it should be applied in all cases, regardless of the intent of the school officials in allowing religious meetings in their schools.

2. Impressionability of school children.

A number of cases distinguish Widmar v. Vincent on the basis of the impressionability of pre-college age children. In effect, these cases are saying that, at the elementary and secondary level, an equal access policy that allows religious clubs to meet on school grounds during the school day has a "religious effect" that violates the second prong of the Lemon v. Kurtzman test.

Both Lubbock, and Brandon v. Board of Education, 635 F.2d 941 (2d Cir. 1980), cert. denied, 454 U.S. 1123 (1981), discussed the impressionability of school children. But both decisions also found that the "equal access" policy had a religious motive.

In Bender v. Williamsport, 741 F.2d

538 (3d Cir. 1984), 475 U.S. 534 (1986), the court of appeals held that although there was a secular purpose in establishing an activities period in which any student club could participate, the "primary effect" of allowing religious groups to meet during that time would enhance religion. The court based its finding entirely on a belief that secondary school students are impressionable and that the school board would send a "message of government endorsement of religion" by permitting student religious groups to meet in the school. This Court ruled that the petitioner did not have standing to appeal to the court of appeals and, therefore, let stand the district court ruling requiring the school to allow the religious group to meet.

It should be noted that four

Justices dissented from the finding of no standing and would have ruled on the merits. The dissenters believed that Widmar controlled the issues in the Bender case and required that the student religious group be granted equal access to the activity period. Justice Powell in particular noted his opinion that the distinction based on the impressionability of high school students was questionable in "this age of massive media information" and did not justify departing from Widmar in the high school context. If nothing else, Justice Powell's comments raise questions as to the continuing strength of the impressionability argument. Yet lower courts continue to use it as does this Court in other first amendment cases.

Even where courts do not mention "impressicnability," they imply that the

Equal Access Act does not apply where allowing the religious group to meet would have a primary effect of establishing religion. The Equal Access Act itself contains no such exception.

In Clark v. Dallas Independent School Dist., 671 F.Supp. 1119 (N.D. Tex. 1987), amended, 701 F.Supp. 594 (N.D. Tex. 1988), app. pending, No. 88-1681 (5th Cir. 1989), the court, citing Widmar v. Vincent and the court of appeals decision in Bender v. Williamsport Area School District, noted that it may be possible to reconcile the constitutional right to free speech with the constitutional proscription against establishment of religion by weighing the interests at stake and determining "which clause should prevail in a given environment . . . The environment at issue here is that of the public

secondary school, with its unique concern for non-sectarian neutrality." 671 F.Supp. at 1124. The court held that under the circumstances in that case the school was correct in refusing to allow religious meetings after they became loud and resulted in attempts to proselytize other students, apparently on the ground that to allow the group to continue to meet would have the primary effect of establishing religion because of the closed school environment. The court refused to apply the Equal Access Act because "the Act would require an unconstitutional result." The court later, on motion of the United States Government, amended its decision to provide that the Equal Access Act does not apply to the facts of this case and that it expressed no opinion as to the Act's constitutionality. 701 F.Supp. 594

(N.D. Tex. 1988).

3. Limited public forum.

In Widmar there was no issue of whether the university operated an open forum since the university plainly acknowledged that its facilities were open to all student groups except religious ones. However, in secondary school cases since then the courts have conflicted on whether the existence of a limited public forum is a relevant consideration. In Bell v. Little Axe Independent School District No. 76 of Cleveland County, the court noted that the district was operating a limited public forum. Nevertheless, the court held that allowing a religious club to meet violates the establishment clause because of the religious intent of the school district.

In Bender v. Williamsport, the court

of appeals held that the district was operating a limited public forum but since the establishment of religion clause stands on a higher plane than the free speech clause, the district could not allow religious groups to meet.

Even those cases that hold that there is no limited open forum imply that the question of forum is not relevant because allowing student religious groups to meet during the school day violates the establishment clause. See, e.g., Garnet v. Renton School District No. 403, 865 F.2d 1121 (9th Cir. 1989).

In contrast, the lower court cases that follow Widmar and the Equal Access Act itself all are predicated on a finding that the school operates a "limited open forum," thus necessitating a determination as to whether a club or activity is curriculum or non-curriculum

related. In the case at bar the court found that the school officials incorrectly designated certain clubs as curriculum-related. That determination raises the issue of the propriety of a court questioning the reasonable educational judgment of the school officials in designating clubs as curriculum-related and non curriculum-related.

This Court has declared on a number of occasions that it is not the province of the courts to make educational decisions. In Bethel School District v. Fraser, 106 S.Ct. 3159 (1986), the Ninth Circuit Court of Appeals held that the school district violated a student's first amendment rights by using its "white middle class standards" to determine whether a student's speech to a student assembly was appropriate. This

Court held that school officials, not the courts, should make judgments with regard to school functions.

In Hazelwood School District v. Kuhlmeier, 108 S.Ct. 562 (1988), the Court overturned the lower court's judgment that the school principal violated first amendment rights by censoring student articles in a school newspaper. The lower court decision asserted that the articles on student pregnancy and the effect of divorce on students were indeed appropriate social issues to be covered in a student newspaper. This Court reversed, stating that schools have the right to censor student newspapers based on "reasonable pedagogical" grounds.

Recently, the Eleventh Circuit in the case of Virgil v. School Board of Columbia County, 862 F.2d 1517 (11th Cir.

1989), following this Court's decision in Hazelwood, held that the school board's decision to remove a humanities textbook from the curriculum was based on a reasonable pedagogical reason, although the court disagreed with the school district's decision.

In this case, the court below has made its own determination as to whether the clubs are curriculum-related. One might reasonably disagree with the school's determination as to whether a particular club is curriculum related; however, as long as the school officials' decision is based on a reasonable pedagogical rationale, it does not seem appropriate for the courts to second-guess that decision.

This Court should decide whether the existence of a limited open forum requires that student religious groups be

granted access to school facilities and if so, the appropriate standard for determining whether a school district has created such a forum. If the determination is to turn on whether or not the groups are curriculum-related, then the deference given to school officials' decisions in other free speech cases such as Fraser and Hazelwood may be appropriate. Certainly the court below did not follow that standard and failed to specify what standard it did follow. Apparently, the court below believes that an activity is "curriculum-related" only if it is tied to the court's own idea of traditional school subjects.

CONCLUSION

School boards and school administrators are used to treading narrow legal lines where the state of the law is less than clear. Through an

excess of caution they can usually obey the law while accomplishing their educational mission. Here that may be impossible. Even were the case law on the constitutional issues completely clear, now that the Congress has passed a law enunciating a federal right, school people cannot defend a suit by a religious group which has been refused the right to meet on school grounds on the basis that extant case law prohibits that action. They must sail the waters between the Scylla of the establishment of religion clause and the Charybdis of the Equal Access Act, a collision with either resulting in a judgment for damages and attorneys' fees under 42 U.S.C. §§ 1983 and 1988.

Until this Court definitively decides this issue, the law will remain unclear to the benefit of no one, except perhaps the lawyers.

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